

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER, SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

BENCH MEMORANDUM
RE: COURT'S SUA
SPONTE MOTION FOR MISTRIAL

Honorable Warren Darrow
Division 6

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits a memorandum of law on the issue of the courts *sua sponte* motion declaring a mistrial in this case.

This court, based upon an order of the Arizona Supreme Court and defense counsel's avowals that further representation of the defendant would violate the rules of ethics, has granted attorneys Hammond, Sears and Chapman's motion to withdraw from this case.

The court subsequently appointed said attorneys to represent defendant for "administrative purposes only" until substitution of counsel occurs. According to said defense counsel, they can not address any issue in this case without violating the professional rules of ethics.

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MEMORANDUM OF POINTS AND AUTHORITIES
RELEVANT PROCEDURAL HISTORY TO THE ISSUE AT BAR

On September 19, 2010 the State disclosed evidence to defense counsel that the defendant authored the "anonymous e-mail." Defense counsel immediately avowed to the court, this information may affect their ability to continue to represent defendant. On September 20, 2010 defense counsel filed an under seal motion requesting a 48 hour stay of trial.

The court then excused the jury for the week of September 20, 2010 while the defense assimilated the impact of their client's involvement in the creation of the anonymous e-mail. From this day forward, all pleadings requesting a delay of the jury trial were filed by the defendant.

On September 27, 2010 and after the court denied defendant's motion to dismiss the charges or remove the Yavapai County Attorney's Office, defense counsel moved to withdraw based upon Ethical Rule 1.7. The State took no position on the motion to withdraw pursuant to ER 1.7.

On September 28, 2010, the court held a hearing on defense counsel's motion to withdraw. At this hearing defense counsel agreed to an *ex parte* proceeding before Judge Brutinel. Following this *ex parte* hearing on September 28, 2010, Judge Brutinel denied defense counsel's motion to withdraw.

On September 29, 2010 Judge Darrow granted defendant's motion to stay proceedings to permit defense counsel time to file a petition for special action. On September 30, 2010 defendant filed a special action petition in Division One of the Court of Appeals. That same date the Court of Appeals, on a motion from defendant, granted a stay pending a decision on the special action petition.

On October 13, 2010 the Court of Appeals accepted jurisdiction and denied relief by a vote of 2 to 1. On October 14, 2010 the Yavapai Superior Court denied defendant's motion to stay proceedings pending a petition to review by the Arizona Supreme Court.

On October 15, 2010 defense counsel filed a petition to review and motion to stay proceedings in the Arizona Supreme Court challenging the decision of the Court of Appeals. The Supreme Court issued a stay of the proceedings on October 15, 2010.

1 On October 26, 2010 the Arizona Supreme Court granted defense counsel's motion to
2 withdraw based on Ethical Rule 1.16(b)(3). This is an important fact to the mistrial issue
3 because the withdrawal was granted pursuant to Rule 1.16(b) (3) and it was all due to
4 defendant's conduct.

5 On October 29, 2010 defense counsel's motion to withdraw was granted but the trial
6 court ordered defense counsel to remain, "to the extent that they are able to ethically, for
7 administrative purposes only." The Yavapai Contract Administrator was ordered to
8 secure substitute counsel for the defendant as soon as possible.

9 A status conference was held on November 5, 2010, to discuss the "conditional"
10 appointment of substitute attorneys Craig Williams and Mike Shaw. Both attorneys
11 informed the court it would take them many months to get prepared to for trial. These
12 attorneys also made it clear to the court they were not in a position to move for a mistrial.

13 Mr. Williams moved to continue the hearing for one week to allow time to determine
14 if any conflict exists. On this date, the State notified the court it was ready to proceed
15 with the trial and opposed a mistrial by the court, noting the delays have been caused by
16 the defendant. Attorney Larry Hammond advised the court he disagreed with the State's
17 position that the defendant's conduct was the cause of the delays in this trial. Attorney
18 Hammond's comments are inconsistent with his motion for withdrawal and likely do not
19 fall under the phrase of "administrative purposes".

20 The court indicated it was considering, *sua sponte*, a motion for mistrial and provided
21 the parties the authorities it was relying on. This bench memorandum is in response to
22 circumstances occurring at the November 5, 2010 status conference.

23 LEGAL ARGUMENT

24 In Arizona, a decision to grant a mistrial is left to the sound discretion of the trial
25 court and will not be reversed on appeal absent an abuse of discretion. See *State v*
26 *Adamson*, 136 Ariz. 239, 263 (1983). In those cases where the trial court declares a
mistrial *sua sponte*, whether the Double Jeopardy Clause permits retrial without
defendant's consent "depends on whether there is a manifest necessity for the mistrial or
whether the ends of public justice will otherwise be defeated." *State v Givens*, 161
Ariz.278, 279 citing *McLaughlin v Fahringer*, 150 Ariz.274, 277 (1986).

1 A mistrial declared because of **manifest necessity** does not bar a new trial. *Arizona v*
2 *Washington*, 434 U.S.497 (1978), In fact, where, for reasons deemed compelling by the
3 trial judge, the ends of substantial justice cannot be attained without discontinuing the
4 trial, a mistrial may be declared without the defendant's consent and **even over his**
5 **objection** and he may be retried consistently with the Fifth Amendment. *Gori v United*
6 *States*, 367 U.S. 364 (1961). (Emphasis added).

7 There are various "degrees of necessity and we require a 'high degree' before
8 concluding that a mistrial is appropriate. *Arizona v Washington*, supra. "A trial judge
9 must therefore engage in a '*scrupulous exercise of judicial discretion*'; *United States v*
10 *Jorn*, 400 U.S. 470, 485, (1971), in order to 'assure himself that the situation warrants
11 action on his part foreclosing the defendant from a potentially favorable judgment by the
12 tribunal.' Id. 486." (Emphasis added.) "All possible alternatives to a mistrial must be
13 considered, employed and found wanting before declaration of a mistrial over the
14 defendant's objection is justified." U.S. V Tinney, 473 F.2d 1085, 1089 (3d Cir.).

15 *Jorn*, supra. "places on the trial judge a duty to exhaust all other reasonable
16 possibilities before deciding to foreclose [a defendant's] option to proceed...The
17 scrupulous exercise of that discretion means that he must seek out and consider all
18 avenues of cure to avoid trial abortion." [Internal quotation marks omitted.]), cert.
19 denied. 412 U.S. 928, 93 S. Ct. 2752, 37 L.Ed.2d 156 (1973).

20 A trial court has acted within its sound discretion in rejecting possible alternatives
21 and in granting a mistrial, if reasonable judges could differ about the proper disposition,
22 even though "[i]n a strict literal sense, the mistrial [is] not 'necessary.'" *Arizona v*
23 *Washington*, supra, at 511, 98 S. Ct. at 833.

24 With regard to the appointment of substitute of counsel and the duty imposed when
25 counsel of record withdrawals during trial, ARCP Rule 6.3(c) mandates:

26 "No attorney shall be permitted to withdraw after a case has been set for trial except
upon motion accompanied by the name and address of another attorney, *together with*
a signed statement by the substituting attorney that he or she is advised of the trial
date and will be prepared for trial." (Emphasis added.)

The trial court can not allow substitute counsel into this case who are not be prepared
for trial and in the same breath unwilling to move for a mistrial. If this were allowed to

1 occur it would be a violation of the duties imposed on counsel and the court pursuant to
2 ARCP Rule 6.3(d).

3 CONCLUSION

4 In *Givens*, supra, the defendant personally moved for a Rule 11 examination after the
5 jury was empanelled. Counsel for the defendant did not join in defendant's motion and
6 stated she did not believe there were any grounds for the motion. The trial court
7 determined defendant's conduct was a deliberated attempt to delay or terminate the
8 proceedings against him on a basis unrelated to a factual determination of his guilt or
9 innocence. The *Givens* court found "The important consideration for purposes of the
10 Double Jeopardy Clause, in this case, is that the defendant was solely responsible for the
11 declaration of mistrial". *Givens*, supra at 281.

12 The defendant's conduct is the sole cause of the lengthy delays in this case. But for
13 defendant's fabrication of evidence and subsequent proffer to the court by his attorneys,
14 the subject e-mail would not have seen the light of day. This attempt by the defendant
15 to perpetrate a fraud upon the court is why the Arizona Supreme Court concluded his
16 attorneys should be permitted to withdraw pursuant of ER 1.16(b)(3).

17 It must not be overlooked, that the practical effect of defense counsel's relentless
18 pursuit to withdraw as defendant's attorney in the fifth month of trial, is the reason this
19 court is contemplating a mistrial.

20 The defense attorneys know substitute counsel may not be able to make the ARCP
21 Rule 6.3(d) avowal. This coupled with a record that no defense attorney is willing to
22 move for a mistrial, is a strategy that can only be intended to be used to posture a claim a
23 violation of the Double Jeopardy Clause. The court is urged not to let this scenario
24 develop any further.

25 If this court, *sua sponte* declares a mistrial over the State's and/or defendant's
26 objections, the State moves for a finding of facts and conclusions of law: 1) all of the
delays subsequent to September 20, 2010 were attributable to the defendant; 2) that
defendant is solely responsible for the declaration of mistrial after the court has
exhausted all other reasonable possibilities; 3) that under the doctrine of manifest
necessity, the ends of substantial justice cannot be attained without discontinuing this
trial; and 4) the Double Jeopardy Clause will not be violated by a re-trial. Without such

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

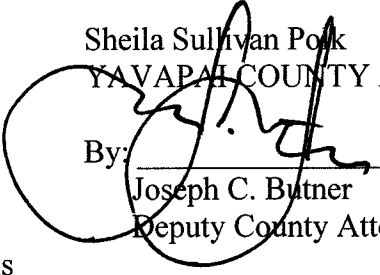
Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

findings of fact and conclusions of law, the ends of public justice will otherwise be defeated.

RESPECTFULLY SUBMITTED this 10th day of November , 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: 
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this
10th day of November , 2010, to:

Honorable Warren Darrow
Division 6
Yavapai County Superior Court
(via email)

John Sears
511 E.. Gurley St.
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

Christopher B. DuPont
Trautman, DuPont
245 West Roosevelt, Suite A
Phoenix, AZ 85003
Attorney for victims
Katherine and Charlotte DeMocker
(via email)

John Napper
634 Schemmer, Ste 102
Prescott, AZ 86305
Attorney for Renee Girard
(via email)

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

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Yavapai County Public Defender
Dean Trebesch
595 White Spar Rd.
Prescott, AZ 86303

By: _____

